88-393

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

STATE OF ALABAMA,

PETITIONER,

VS.

JAMES LEWIS SMITH,

RESPONDENT.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

OF

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APPENDIX A

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1987-88

Ex parte James Lewis Smith

86-1488 PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(Re: James Lewis Smith
v.
State of Alabama)

JONES, JUSTICE.

The petitioner was arrested and indicted on charges of rape, burglary, and sodomy, all arising out of the same alleged incident. As a result of a plea bargain agreement, the sodomy charge was nol-prossed and the petitioner pleaded guilty to the charges of first degree rape and first degree burglary. After a sentencing hearing, the petitioner was sentenced to 30 years on each conviction, the sentences to run concurrently.

Subsequently, the petitioner filed a motion seeking to withdraw his guilty pleas, claiming that he did not enter the guilty please knowingly or voluntarily. The trial court denied this motion. The Court of Criminal Appeals, however, found that the petitioner had not been properly informed of the potential sentences before pleading guilty, reversed the conviction and sentences, and remanded the cause to the trial court. Smith v. State, 494 So. 2d 182 (Ala. Cr. App. 1986).

The State than moved to reinstate the charge of first degree sodomy. On remand, the case was reassigned to the same trial judge, and he granted the State's motion to reinstate the original indictment. After a hearing on a number of defense motions, trial was conducted on the merits of the case. The jury

returned a verdict of guilty on all three counts. After a sentencing hearing, the petitioner was sentenced to life imprisonment for the conviction of first degree sodomy, which term was to run concurrently with a life term for the first degree burglary conviction. The petitioner was also sentenced to a term of 150 years for the conviction of first degree rape, that sentence to run consecutively to the other two sentences. The Court of Criminal Appeals affirmed the conviction, affirmed the life sentences for the sodomy and burglary convictions, and remanded to the trial court for resentencing on the rape conviction.

We granted the defendant's request for review of the Court of Criminal Appeals' judgment affirming the judgment of the sentence that enhanced the petitioner's sentence for burglary

from 30 years to life imprisonment. The 150-year sentence for rape and the life sentence for sodomy are not before us for review. We reverse and remand as to the enhanced sentence for burglary.

In the resentencing of the petitioner after remand and conviction, the trial court stated:

> "The court finds that since I did not hear all the testimony during your plea and now at trial have heard all the testimony . . . , the court finds that it's proper to increase the [burglary] sentence beyond that which was given you on the plea bargain."

It is clear that the trial judge increased the petitioner's sentence because of his subjective observations and not because of any objective evidence of events subsequent to the petitioner's first conviction. We adopt the language from Rice v. Simpson, 274 F. Supp. 116 (M. D. Ala. 1967), affirmed, 396 F. 2d 499 (5th Cir. 1968),

affirmed sub nom North Carolina v. Pearce, 395 U.S. 711 (1969), as the applicable rule in Alabama:

> "[T]here can be no increase in a sentence in a criminal case after the sentence is imposed. . . . To deny such protection to conviction criminals who elect to exercise their post-conviction remedies and do so successfully is unfair discrimination and does nothing except to serve to limit the use of post-conviction proceedings in the Alabama state courts by prisoners. It denied the prisoner the protection of his original sentence as a condition to the right of his appealing his conviction or exercising his post-conviction remedies."

274 F. Supp. at 122. See, also, Ex parte Tice, 475 So. 2d 590 (Ala. 1984).

In support of the affirmance of the petitioner's enhanced sentence in the burglary conviction, the State quotes the following language from North Carolina v. Pearce, 395 U.S. 711 (1969):

"A trial judge is not constitutionally precluded . . . from imposing a new sentence whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.' Williams v. New York, 337 U.S. 241, 245. Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new pre-sentence investigation, from the defendant's prison record, or possibly from other sources. The freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle, fully approved in Williams v. New York, supra, that a state may adopt the prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. Id., at 247."

395 U.S. at 723.

The State's reliance on Pearce is misplaced. Indeed, in unmistakable

terms, the holding in Pearce makes it abundantly clear that the authorization for an enhanced resentencing "in the light of events subsequent to the first trial" is an exception to the general rule that, absent such evidence, a sentence imposed at the first trial may not be enhanced upon reconviction at the second trial after the first conviction has been overturned on appeal and remanded for a new trial.

REVERSED AND REMANDED.

Torbert, C.J., and Almon, Shores, Houston, and Steagall, JJ., concur.

Maddox, Beaty, and Adams, JJ., dissent.

Ex parte James Lewis Smith

MADDOX, JUSTICE (Dissenting.)

I do not believe that the trial court erred in enhancing the petitioner's sentence. In some respects, this case is similar to Wesley v. State, 481 So. 2d 1155 (Ala. Cr. App. 1985), reversed and remanded 481 So. 2d 1162 (Ala. 1985), on remand, 481 So. 2d 1163 (Ala. Cr. App. 1985). In that case, Wesley was indicted for robbery in the first degree, and that indictment was amended to charge attempted robbery. He pleaded guilty to that charge, but his plea was set aside on appeal because the general attempt statute was no longer applicable to robbery offenses. Wesley v. State, 448 So. 2d 468 (Ala. Cr. App. 1984). Wesley was retried on the same indictment, but for robbery in the first degree, and the

Court of Criminal Appeals affirmed his conviction on that charge. This Court reversed that decision of the Court of Criminal Appeals saying: "It follows that when the State of Alabama chose to try petitioner again on the void amended indictment, his conviction was erroneous. However, as stated in Wesley, supra, the State of Alabama is free to reindict petitioner for the appropriate offense. Williams v. State, 333 So. 2d 613 (Ala. 1976)." Ex parte Wesley, 481 So. 2d 1162, 1163 (Ala. 1985). (emphasis added). Implicit in this holding is the idea that Wesley could receive a higher sentence than was imposed when he pleaded guilty, because he could be tried for robbery I.

Furthermore, change and sentence concessions can be made when an accused voluntarily enters a plea of guilty and the principles of North Carolina v. Pearce, 395 U.S. 711 (1969), would not

apply. Instead, the principles of Brady v. United States, 397 U.S. 742 (1970), would apply. The Supreme Court of the United States held in Brady that sentence concessions may be made constitutionally when persons plead guilty. The Court held:

> "Brady's claim is of a different sort: that it violates the Fifth Amendment to influence or encourage a guilty plea by opportunity or promise of leniency and that a guilty plea is coerced and invalid if influenced by the fear of a possibly higher penalty for the crime charges if a conviction is obtained after the State is put to its proof.
>
> "... We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.

consideration for the victims of his or her criminal activity, by desiring either to make restitution or to prevent unseemly public scrutiny or embarrassment to them; or

"(iv) the defendant has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct.

"(b) The court should not impose upon a defendant any sentence in excess of that which would be justified by any of the protective, deterrent, or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove guilt at trial rather than to enter a plea of guilty or nolo contendere."

In this case, petitioner successfully attacked his guilty plea on the basis that the maximum possible sentence was not explained to him; his plea was not, therefore, knowingly and intelligently given.

It would appear to me that a petitioner should not be allowed to receive sentence concessions in return for a guilty plea and then, after a successful attack on that plea, bind the State to its original sentencing bargain if he is later convicted after a trial. Thus, a petitioner could go to trial and chance an acquittal knowing he could receive a sentence no harsher than he was originally given.

The facts of this case are dissimilar to North Carolina v. Pearce, in my opinion, and I would affirm the judgment of the Court of Criminal Appeals; consequently, I must respectfully dissent.

Adams, J., concurs.

ON APPLICATION FOR REHEARING

JONES, JUSTICE.

APPLICATION FOR REHEARING OVERRULED.

Almon, Shores, Houston, and Steagall, JJ., concur.

Torbert, C. J., and Maddox, Beatty, and Adams, JJ., dissent.

MADDOX, Justice (Dissenting from denial of rehearing).

The majority denies the State's application for rehearing without comment, apparently on the ground that the State has presented nothing new for the Court to review. I believe the State has shown in its brief why the case of North Carolina v. Pearce, 395 U.S. 711 (1969), is not applicable here.

Because the majority fails to distinguish cases cited in the State's brief that indicate to me that we should grant rehearing in this case, I take this opportunity to extend the dissent which I filed on original deliverance. In my opinion, the Supreme Court of the United States has refused to broaden the scope of Pearce, especially in fact situations such as that presented here.

In Bordenkircher v. Hayes, 434 U.S. 357 (1978), the defendant, with counsel, and the prosecutor, entered into plea negotiations whereby the prosecutor offered to recommend a five-year sentence if the defendant would plead guilty as charged to uttering a forged instrument. The prosecutor told the defendant that if he did not plead and save the court the inconvenience and necessity of a trial, he would return to the grand jury and

seek an indictment under the habitual offender law, subjecting the defendant to a mandatory sentence of life imprisonment. The defendant rejected the offer, and the prosecutor obtained an indictment charging him under the habitual offender law. The defendant was subsequently tried and convicted and sentenced to life imprisonment. The defendant then challenged the prosecutor's actions, claiming it was an impairment of his constitutional rights to a trial. Id. at 359. The Supreme Court found Pearce to be distinguishable. In Pearce, the State unilaterally imposed a penalty upon a defendant who had chosen to exercise his right to appeal his original conviction. The Court found this was a situation "very different from the give-and-take negotiation common in plea bargaining between the prosecution and

defense, which arguably possess relatively equal bargaining power." Id. at 362. The Court further stated:

> "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.' . . . But in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.
>
> Plea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial."

Id. at 363 (citations omitted). The Court found the prosecutor's action to be constitutional, stating that a "rigid constitutional rule" prohibiting a prosecutor from acting forthrightly in his dealings with the defense "could

only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged." Id. at 365.

Although Bordenkircher dealt with prosecutorial vindictiveness rather than judicial vindictiveness, its reasoning is persuasive in the instant case. Here, as in Bordenkircher, the petitioner was given the option of either accepting the plea bargain or insisting upon trial. Further, just as the defendant in Bordenkircher was aware of the consequences of rejecting the prosecutor's offer of a plea bargain, the petitioner in this case was aware of the consequences of setting aside the plea bargain. The supplemental transcript indicates that the petitioner was aware that the sodomy charge was nol-prossed only because of his guilty

plea. Additionally, he was aware that the maximum sentence he could receive a burglary I was life imprisonment and that that was the maximum sentence for rape I as well. As is the custom where a court sentences an accused following a guilty plea, the court in this case displayed leniency in sentencing the petitioner to concurrent sentences of 30 years for burglary I and rape I. However, petitioner chose to forgo this leniency, and by appealing his conviction, withdrew his plea, thus tacitly repudiating his plea bargain agreement. See Moore v. Foti, 546 F. 2d 67 (5th Cir. 1977). Thus, petitioner chose to subject himself to the possibility of receiving life sentences for rape I and burglary I if convicted and having reinstated the sodomy I charge with its maximum sentence of life imprisonment.

the State reinstituted the first degree murder charge. In his federal habeas corpus petition, the defendant asserted that this action placed him in double jeopardy. The Fifth Circuit rejected this argument and stated that the defendant's successful challenge to his plea bargained sentence was a "tacit repudiation of the bargain, allowing the government to prosecute him on the greater charge." 546 F.2d at 68.

Although Foti dealt with double jeopardy issues, its reasoning is useful in the instant case. Like the defendant in Foti, the petitioner in this case successfully challenged his plea bargained conviction and sentence because he was obviously unsatisfied with the sentence initially imposed. Foti held that in such an instance, the defendant's action is a "tacit repudiation" of the plea bargain

agreement and he must face the consequences of his decision.

Like the defendant in Foti, the petitioner in this case repudiated the plea agreement. By this action, he not only permitted the State to reinstitute the sodomy I charge, but also permitted the trial court to enhance his sentence, because the sentence initially imposed was at least partly the result of leniency shown because he did not inconvenience the court and cause embarrassment to the victim when he chose to plead guilty to the charges rather than to stand trial.

In Frank v. Blackburn, 646 F. 2d 873 (5th Cir. 1980), the analysis of Bordenkircher was applied to the issue of judicial vindictiveness. In Frank, the defendant attacked his sentence on the ground that the trial judge impermissibly increased his sentence

because he rejected a plea bargain offer and elected to stand trial. The trial court offered a 20-year sentence if the defendant would plead guilty to the charge, but the defendant opted to stand trial. Upon conviction, he was sentenced to 33 years. The federal district court denied habeas corpus relief, but a three-judge panel of the Fifth Circuit reversed, finding that the defendant was penalized by the state court because he exercised his right to stand trial. The court later decided to rehear the case en banc "because of its potentially devastating impact upon the plea bargaining process." 646 F. 2d at 875. A majority of the en banc court found that no constitutional rights were violated in the conviction and sentencing of the defendant.

In reaching its decision, the court noted the advantages of the plea

bargaining process, which it found to expedite justice and to conserve judicial resources. 646 F. 2d at 878. The court agreed with the defendant's assertion that a person cannot be punished simply for exercising his constitutional right to stand trial, but the court did not agree that the mere imposition of a longer sentence than defendant would have received had he pleaded guilty automatically constitutes such punishment. Id. at 883. A defendant is free to accept or reject the offer of the State. Once it is rejected, however, the defendant cannot complain that the denial of the benefits of the offer he rejected constitutes punishment or evidences judicial vindictiveness. "To accept such an argument is to ignore completely the underlying philosophy and purpose of the plea bargaining system. If a defendant

can successfully demand the same leniency after standing trial that was offered to him prior to trial in exchange for a guilty plea, all the incentives to plea bargain disappear; the defendant has nothing to lose by going to trial." Id. at 883.

APPENDIX B

THE COURT: You had a trial and were convicted of rape, burglary and sodomy in the first degree. When you entered your plea, you told me your side of the story. And of course, now that the court has had a trial and heard all of the evidence -- and the court by no means would increase your punishment beyond thirty years for rape and burglary on the fact that you were successful on your appeal because this court doesn't get into punishing or attempting to punish people for exercising all of their constitutional rights which is to appeal from a

conviction or plea, or to have a trial if you so desire. There is nothing this court does which should be viewed as punishment for a successful appeal. I hope we all understand that. But under North Carolina versus Pearce, 395, U.S. 711; 23, L. ED., 2D, 656; 89 S. CT., 2072, the court finds that since I did not hear all of the testimony during your plea and now at trial have heard all of the testimony which consisted of raping the victim at least five times, and after the second or third time, then causing her to perform oral sex on you, and then of course, your performing oral sex on

her, and then of course, at least raping her one or two more times after that, threatening her life with the knife and all, after looking at this matter, and your mental outlook on it and your position during the trial and what you said, the court finds that it's proper to increase the sentence beyond that which was given to you on the plea bargain.

Okay. In addition to that, the habitual offender act has been imposed. And taking everything into consideration from the events of the crime, in the case of 85-1684, burglary in the first degree, do you have anything to say now

after the court has explained to you its position on after hearing all of the evidence that was presented during the trial? Do you have anything to say before I sentence you?

THE DEFENDANT: No, sir.

THE COURT: In case number 85-1684, burglary in the first degree, the court hereby sentences you to life in the penitentiary.